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NO. 85-714

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1985

THE STATE OF TEXAS, *et al.*,
*Appellants*

vs.

THE UNITED STATES OF AMERICA,
*Appellee.*

On Appeal from the United States Court for the Western District of Texas

## APPELLANTS' REPLY BRIEF

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The State of Texas, its Governor Mark White, and its Secretary of State Myra A. McDaniel (collectively designated as "Texas") oppose the motion of the United States to affirm the holding of the district court in this cause and respectfully renew their request that this Court note probable jurisdiction in, and grant plenary consideration of, this case.

## ARGUMENT

1. The Justice Department ("Justice"), in its motion to affirm, persists in its mistaken assertion that *NAACP v. Hampton County Election Commission*, 105 S.Ct. 1128 (1985), controls the disposition of this case. Mot. to Aff. 7. This position obscures the novelty and importance of the issues presented by the present case—whether established state standards, practices, or procedures with discretionary provisions and validation under section 5 of the Voting Rights Act of 1965, as amended (42 U.S.C. §1973c (1982)) ("section 5"), may lawfully authorize State officials' limited exercise of this discretion in the selection of voting dates; and whether section 5 coverage

indeed precludes any exercise of discretion by State officials.

Justice's motion is replete with assertions, express and implied, that *Hampton* is controlling (see, e.g., Mot. to Aff. 7-10, 13 & n. 15). One assertion, however, is paradigmatic of Justice's failure to understand the nature of that case, and will accordingly be extensively analyzed to illustrate Justice's misreasoning. In a footnote Justice argues,

> Appellants attempt to distinguish *Hampton County* on the ground that the statute at issue there did not confer any discretion upon county officials (J.S. 14). However, the Court focused on whether the Attorney General had examined *the dates* for the candidate qualifying period and special election, not *the source of the county officials' authority to call the special election.*

Mot. to Aff. 13 n.15 (emphasis supplied). Centuries ago the master—and inventor—of formal logic identified the fallacy in this line of argument.

> Knowledge of a fact and knowledge of the reason for it differ. . . [Consider,] *e.g.*, the proof that the planets are near because they do not twinkle. . . [T]his syllogism proves not the reason but the fact; for it is not because the planets do not twinkle that they are near, but because they are near that they do not twinkle.

Aristotle, *Posterior Analytics* I, xiii, 78a22-40 (Loeb ed., H. Tredennick trans. (1966) at 85, 87).

Thus the election officials in *Hampton* did not act in violation of section 5 *because* they exercised discretion in selecting qualification and election dates. Rather, their selection of these dates violated section 5 *because* they had no underlying authority—statutory or traditional—for their selection of them and, *a fortiori*, had no section 5 preclearance or other validation for their actions. Texas election officials, in contrast, acted on the basis of the crucial element of authority missing altogether in *Hampton* because Texas officials had both

precleared statutory authority and a valid practice (predating section 5 applicability) to justify their actions. J.S. at 11-13.

Justice's position obliterates this central distinction between *Hampton* and the present case, and, in so doing, obscures the importance of this case. Texas emphatically asserts that it had the underlying authority in its own laws and traditions for its officials' actions, that these standards, practices, and procedures were valid under section 5, and that this Court should affirm the lawfulness of these officials' limited discretionary actions under section 5.

2. Coverage under section 5 of the Voting Rights Act of changes in state election standards, practices, or procedures is determined by "[1] whether such changes have the potential for diluting the value of the [minority] vote *and* [2] are within the definitional terms of § 5." *Georgia v. United States,* 411 U.S. 526, 534 (1973) (emphasis supplied). The section 5 definition of such a change requires that a current suspect standard, practice, or procedure be compared with a corresponding *past* standard, practices, or procedure. J.S. at 10. The allowable variation of election dates built into Texas law did not allow such a comparison with the past, since all possible dates for selection were contemporaneously available for official choice. J.S. at 10-11. Thus the official acts in question here did not conform to the second prong of the *Georgia* requirement for a section 5 change—the definitional prong.

Justice attempts to collapse the required definitional element of past comparison into the other requirement for section 5 coverage—that there be potential for dilution of minority voting strength. Mot. to Aff. 7-8, 9. Attention to one case cited by Justice for the proposition that Texas officials' actions involved section 5 "changes" illustrates this point. Mot. to Aff. 7. In *United States v. Board of Commissioners of Sheffield, Alabama,* 435 U.S. 110 (1978), this Court reviewed a number of its cases granting very broad scope to the coverage of section 5. *Id.* at 122-124. The Court concluded, without express reference to the definitional element of section 5:

> In each case, federal scrutiny of the proposed change was required because the change had *the potential*

> *to deny or dilute rights conferred by §4(a)* [of the Voting Rights Act].

*Id.* at 123 (emphasis supplied).

Justice later shifts its ground, however, and instead argues that Texas officials in the questioned election did indeed engage in a practice "different from that in force or effect on November 1, 1972." 42 U.S.C. § 1973c (1982). Mot. to Aff. 10. The argument is that Tex. Elec. Code Ann. art. 2.01b (Vernon Supp. 1985) was amended in 1983 to impose more stringent controls on the Governor's calling of emergency elections than those which existed under the pre-1972 practice. Even if, *arguendo,* this 1983 amendment produced a section 5 "change" when compared with the pre-1972 practice, there was no lapse in section 5 validity. The change in art. 2.01b has been submitted and precleared. R. Exh. 6 (Supp. App. to J.S. at F-3).

Justice's argument that "[s]ince Governor White's action was based upon post-1972 statutes, it necessarily constitutes a change from the pre-1972 procedures" is equally vapid. Mot. to Aff. 11 n.13. All the Texas election statutes in question here have either been pre-cleared or pre-exist the 1972 section 5 effective date in Texas. J.S. at 11-12 & n.7. Even if the operation of these statutes constitutes a "change" from pre-1972 practice, Justice's argument is stillborn. Following these statutes in the selection of election dates still produces no difference from a past practice that comprises the essential section 5 definitional element, because these statutes—especially art. 2.01b—contain within themselves the sufficient authority for concurrent choice and rejection of alternative election dates, authority which in no way involves a retrospective consideration of past standards, practices, or procedures.

3. Justice complains that the Governor's exercise of discretion deprived it of the opportunity for section 5 review of his action "in the specific circumstances of this particular election." Mot. to Aff. 12. The first answer to this argument is that Justice had the opportunity, when the relevant component parts of the Texas Election Code were submitted to it for section 5 preclearance review, to analyze every possible operation of these statutes (which have definite and cognizable perimeters

to the discretion authorized) and to interpose specific objections if any defect were found. See J.S. at 14. Instead, Justice has followed the practice of furnishing clearance letters with opaque and vague references to objections which might arise under unspecified circumstances. R. Exh. 4-6 (Supp. App. to J.S. at F-1, F-2, F-3). If the Attorney General had interposed some specific objection to the operation of the statutory scheme here, the State could either have amended the offending statute to bring it into compliance or "the State [could] still [have] enforce[d] the legislation upon securing a declaratory judgment in the District Court for the District of Columbia." *Allen v. State Board of Elections*, 393 U.S. 544, 549 (1969). It is paradoxical that Justice shifts the focus away from a problem largely of its own making.

The second answer to Justice's complaint is that their approach would make enforcement of section 5 unmanageable if every election procedure must be examined "in the specific circumstances of [a] particular election." Mot. to Aff. 12. Even state election standards, practices, or procedures with fixed, theoretically nondiscretionary provisions must be applied to novel, changing conditions. There will always be contingent matters to be considered and some discretion to be applied. Some restrictions must therefore be placed on Justice's consideration of the narrow contexts of particular elections; otherwise "the sheer volume of applications for preclearance" caused by such review could burgeon into an unworkable caseload for Justice and for the federal courts. *Cf. City of Port Arthur v. United States*, 459 U.S. 159, 103 S.Ct. 530, 538-39 (1982) (Powell, J., dissenting).

4. Justice implies that it has both the power and the duty to process section 5 submissions promptly in order not to interfere with a State official's exercise of discretion in a short-term emergency. Mot. to Aff. 15-17. Certainly the Department has no legal duty to make an expedited review, because "the Attorney General cannot guarantee that such consideration can be given." 28 C.F.R. § 51.32(b) (1984). As for its power in these matters, it exists principally to extend the statutory 60-day period, not to contract it.

In *Georgia v. United States, supra*, 411 U.S. 526, the Court

outlined *two* ways in which Justice can extend the period: (1) when the Attorney General (or his delegate) "cannot within the 60-day time period satisfy himself that the change is without a discriminatory purpose or effect," *id.* at 537 (see current 28 C.F.R. § 51.39(e) (1984)), he may object and "parties whose submissions are objected to may seek reconsideration . . . and obtain a ruling within 60 days of that request", *id.* at 539 (see current 28 C.F.R. § 51.47(a) (1984)); and (2) when the Attorney General notifies a submitting authority that a section 5 submission is incomplete, a new 60-day period commences only when the required information is furnished. *Id.* at 539-41. (see current 28 C.F.R. § 51.35(a) (1984)). Justice failed altogether to identify the first method of extension, and clothed its discussion of the second in a pleasant description of how the initial 60-day period is usually ample for section 5 review. Mot. to Aff. 15-16.

These assertions that the Justice Department bureaucracy can process, amid its ever increasing caseload, the submissions for exercise of short-term state discretion provide tepid, if any, assurance. Government by "bureaucracy [is] the rule of nobody." H. Arendt, *The Human Condition* 45 (1958). With so many opportunities within the bureauracy to obliterate through delay the Governor's power of short-term discretion in emergencies, Texas objects to the relegation of its vital electoral interests to such a "rule of nobody" and argues instead that section 5 preclearance, once obtained, should provide guidance for the conduct of state elections without unnecessary delay or interference.

## CONCLUSION

For the foregoing reasons, this Court should deny the motion to affirm and instead should note probable jurisdiction of this appeal.

Respectfully submitted,

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